

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 6, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-2967-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**BILLIE T. HILL,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Rock County:  
JAMES E. WELKER, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Billie T. Hill appeals from an order denying his motion for postconviction relief. He argues that he did not knowingly, intelligently and voluntarily waive his right to counsel at a sentencing proceeding. We agree. For the reasons set forth below, we reverse the order and remand for resentencing.

## STANDARD OF REVIEW

Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court correctly exercised that discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). However, designating a matter as discretionary is not tantamount to designating it as unreviewable. Rather, a discretionary decision will be reviewed to determine whether it is the "product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

## ANALYSIS

In 1991, Hill pled guilty to and was convicted of forgery. The circuit court, Judge Richard Long presiding, withheld sentence and placed Hill on probation for ten years. In September 1993, the Department of Corrections revoked Hill's probation. In March 1994, Hill appeared before the circuit court, Judge James E. Welker presiding<sup>1</sup>, for sentencing. At the sentencing hearing, the court asked Hill whether he wanted an attorney and Hill declined. The court sentenced Hill to four years, consecutive to another sentence he was then serving.<sup>2</sup>

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<sup>1</sup> The court disposition was signed by Judge Richard Long on March 21, 1994. The court minutes reveal that Judge Welker presided over the sentencing hearing, and the transcripts reveal that Judge Welker imposed the sentence being appealed. Although the written order memorializing the sentence was signed by Judge Long, the actual sentence appealed from was imposed by Judge Welker.

<sup>2</sup> At the sentencing hearing, the following colloquy took place:

THE COURT: The record should show the appearance of Assistant District Attorney Gerald Urbik for the State of Wisconsin, the appearance of Mr. Hill in person and in custody and, Mr. Hill, do you have an attorney in this matter?

THE DEFENDANT: No, Your Honor. I am presently at Waupun facilities, and when this happened, I was just returned to

(.continued)

court. I didn't know the date or anything like that.

....

THE COURT: Do you understand what this is about?

THE DEFENDANT: Yeah. I am willing to go on with the proceedings.

THE COURT: Do you want an attorney? Do you want time? I will set it over until Monday and you can talk to a lawyer, or do you want to proceed without a lawyer?

THE DEFENDANT: If I could proceed, I would like to proceed, Your Honor.

THE COURT: You understand that you have a right to an attorney and if you are not able to afford an attorney because of poverty, then an attorney would be appointed to represent you at no cost to you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you want to proceed without a lawyer?

THE DEFENDANT: Yes.

THE COURT: The Court finds that the right of counsel is freely, voluntarily, and intelligently waived and, accordingly, Mr. Urbik, I will hear you regarding sentencing.

After this finding, the court heard the prosecutor, who recommended that the court adopt the recommendation of the probation agent, and sentence Hill to the maximum ten-year sentence on the forgery charge. The court asked Hill whether there was anything he wanted to say. Hill replied that his understanding of the probation supervising agent was as follows:

THE DEFENDANT: He recommended my time to be a moderate sentence and also concurrent time to the time I am now serving and upon that, that is why I wished to proceed because I was told that. Otherwise, you know, I am lost.

Further colloquy developed that Hill was unaware that the probation agent had recommended ten years, because he was "going on the recommendation at the time of my revocation with the officer that was present with me [and who has since retired] .... This is where I am staying."

A lawyer must be "afforded" to indigent persons at revocation of probation or deferred sentencing because "certain legal rights may be lost if not exercised at this stage." Counsel can help to "marshal[ ] facts, introduc[e] evidence of mitigating circumstances and in general aid[ ] and assist[ ] the defendant to present his case as to sentence ...." *Mempa v. Rhay*, 389 U.S. 128, 135, 136 (1967). Although a defendant can waive the right to counsel, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open" *Faretta v. California*, 422 U.S. 806, 835 (1975) (citation omitted).

Thus, the record must disclose that the defendant has "a general appreciation of the seriousness of the charge and of the penalties he may be exposed to before deciding to take a chance on his own skill." *State v. Pickens*, 96 Wis.2d 549, 563, 292 N.W.2d 601, 608-09 (1980). "Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowing and voluntary waiver will not be found. *Id.*, 96 Wis.2d at 563-64, 292 N.W.2d at 609.

The record of the sentence hearing reveals that Hill did not know the penalties to which he might be exposed. Although Hill was made aware he could have an attorney, he was not made aware of the dangers and disadvantages of self-representation. As the State concedes, a formal colloquy helps establish that a defendant is competent to represent himself. Such a colloquy was missing in this case, and Hill was not otherwise made aware of the dangers he faced. Because the sentencing court failed to elicit the necessary facts to show whether the waiver was knowing, intelligent and voluntary, it did not correctly exercise its discretion in imposing sentence. On remand, the circuit court shall vacate the sentence and conduct a new sentencing hearing.

*By the Court.* – Order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.